SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 512.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY AND THE EQUITABLE TRUST COMPANY OF NEW YORK, PETITIONERS,

vs.

NORTHERN SECURITIES COMPANY.

Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

ANSWER AND RETURN TO ANSWER, FILED IN UNITED STATES CIRCUIT COURT, DISTRICT OF NEW JERSEY.

(19,512.)

(19,612.)

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vs.

NORTHERN SECURITIES COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

ANSWER AND REPLICATION TO ANSWER, FILED IN UNITED STATES CIRCUIT COURT, DISTRICT OF NEW JERSEY.

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Circuit Court of the United States,

District of New Jersey.

In Equity.

EDWARD H. HARRIMAN, WINSLOW H. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and the EQUITABLE TRUST COMPANY OF NEW YORK, Complainants,
vs.
NORTHERN SECURITIES COMPANY and others, Defendants.

THE SEPARATE ANSWER OF THE DEFENDANT, THE NORTHERN SECURITIES COMPANY, TO THE SECOND AMENDED BILL OF COMPLAINT OF THE PLAINTIFFS.

I.

This defendant admits the statements of paragraph I of the bill of complaint.

II.

This defendant admits the statements of paragraph II of the bill of complaint.

III.

This defendant admits that in November, A. D., 1901, the outstanding capital stock of the Northern Pacific Railway Company was of the aggregate par value of one hundred and fifty-five million dollars ($155,000,000), and consisted of seventy-five million dollars ($75.000,000) preferred stock and eighty million dollars ($80,000,000) common stock. This defendant denies that any part of the said preferred stock was or could have been converted into common stock, but avers that, in the exercise of a right to do so belonging to it, under the laws of the State of Wisconsin, to which it begs leave to refer, and in pursuance of resolutions duly adopted by its Board of Directors at a meeting thereof regularly held on November 13th, A. D. 1901, the Northern Pacific Railway Company duly paid off at par, in cash, and retired, on or as of the 1st day of January, A. D. 1902, all of the said preferred stock, and that since the last named date all the said preferred stock has ceased to exist, and never since has been represented by any form of stock of the Northern Pacific Railway Company.

For the sole purpose of raising the moneys required for so paying off and retiring the said preferred stock, the Northern

Pacific Railway Campany, in pursuance of the said resolutions adopted by its Board of Directors, duly issued and sold, in the month of November, A. D. 1901, at par, for cash, to the holders of the said eighty million dollars ($80,000,000) of its common stock, in proportion to their respective holdings of such stock, its bonds, to the amount of seventy-five million dollars ($75,000,000), par value, convertible into new common stock of like amount, at par.

After the issuance and sale of such convertible bonds, and on and prior to January 1st, A. D. 1902, all the said convertible bonds were actually converted into new common stock of the Northern Pacific Railway Company of like amount; so that since January 1st, A. D. 1902, the outstanding capital stock of the Northern Pacific Railway Company has consisted of shares amounting to one hundred and fifty-five million dollars ($155,000,000), par value, all of like form and rights.

The authorized capital stock of the Great Northern Railway Company consists of shares amounting to one hundred and twenty-five million dollars ($125,000,000), par value, all of like form and rights, of which about one hundred and twenty-three million dollars ($123,000,000) are now outstanding.

IV.

This defendant admits that, during the times mentioned in said bill of complaint, the said Railway Companies owned or otherwise controlled, and operated, systems of railways located in the region mentioned in paragraph IV of said bill of complaint.

V.

This defendant admits that on or about November 13, A. D. 1901, it was incorporated under the laws of the State of New Jersey, with power to buy, own and sell the stocks and other securities of other corporations; and that its authorized capital stock is four hundred million dollars ($400,000,000) divided into shares of one hundred dollars ($100) each; and avers that the objects and purposes of the organization of this defendant are fully and completely set forth in its certificate of incorporation, and denies that the promoters of its incorporation, or its incorporators, or its stockholders, or its Board of Directors or its officers have ever had any design to use this defendant for any purpose not fully stated in the said certificate.

This defendant denies that the persons named in paragraph V of the said bill of complaint, or any of them, or said persons and any other persons associated with them, or with any of them, have at any time owned, or otherwise controlled, a ma-

jority of the capital stock of either of the said Railway Companies; and denies that the said persons, or any of them, or any of said persons and any other persons associated with them, or with any of them, have ever agreed that this defendant should acquire or hold a majority of the stocks of said Railway Companies in perpetuity, or for any period of time whatever, or have ever agreed that this defendant should hold any stock, or any other property, acquired by it, in perpetuity, or for any period of time whatever, or that any existing holder of stock of either of the said Railway Companies should deposit the same with this defendant for any purpose whatever, or upon any condition or terms whatever, or that this defendant should act as custodian, depositary or trustee of any stock of either of said Railway Companies.

This defendant denies that it was incorporated in pursuance of any agreement as stated in said paragraph of the said bill of complaint; and denies that it has ever agreed to acquire or to hold any share of railway stock, or any other property, as custodian, depositary or trustee, or to issue in exchange therefor any certificate of its own stock on that basis.

VI.

This defendant admits that there have been issued and now are outstanding certificates for 3,954,000 shares (each of the par value of $100) of its capital stock, which certificates (besides $45,332,236.50) in cash were issued and paid as follows, viz.:

1,768,229 shares (and $43,625,481.50 in cash) for 1,537,594 shares (each of the par value of $100) of the common stock and 410,850 shares of the preferred stock of the Northern Pacific Railway Company; which preferred stock was delivered and transferred to the Northern Pacific Railway Company in consideration of and exchange for $41,085,000 cash received therefor by this defendant with the knowledge and assent of the said Edward H. Harriman and Winslow S. Pierce;

2,110,576 shares (and $1,707,200 in cash) for 1,181,242 shares (each of the par value of $100) of the capital stock of the Great Northern Railway Company;

75,220 shares to the public for cash used for the purchase of other property, and for corporate purposes. Since its purchase of said railway stocks it has caused all the same to be transferred and registered on the stock transfer books of the said Railway Companies to itself, either in its own name or in the names of other persons for it, and still holds all the said railway stocks so transferred and registered.

This defendant admits that all and singular the persons to

whom the stock of this defendant was issued, whether for shares of either of said railway companies or for cash, on and prior to the 18th day of November, 1901, including the complainants Harriman and Pierce, had full knowledge and information of the purposes for which this defendant was organized, and of the fact that a majority of the capital stock of each of said companies had come, or might come, into the ownership of this defendant for its corporate purposes; but this defendant avers that a very large majority of the stock of this defendant has been sold and issued to, and is held by, persons not concerned in promoting this defendants' organization, and who never have had any knowledge or means of knowledge of the purposes of the said promoters, save as they appear upon the face of said certificate; and this defendant denies that any person ever knew, or ever had any reason for supposing, that any share of the said railway stocks had ever been, or would be, deposited with or held by this defendant as custodian or depositary.

VII.

This defendant admits that on November 18th, A. D. 1901, forty-one million eighty-five thousand dollars ($41,085,000), par value of the preferred stock, and of thirty-seven million twenty-three thousand dollars ($37,023,000), par value, of the common stock of the Northern Pacific Railway Company, were standing upon the stock transfer books of the said Railway Company, registered in the personal names of the plaintiffs, Harriman and Pierce; and that on said day the plaintiffs Harriman and Pierce, duly transferred to this defendant all the said preferred and common stock, they receiving therefor the lump and unapportioned sum and price of ninety-one million four hundred seven thousand five hundred dollars ($91,407,500), of which eight million nine hundred fifteen thousand six hundred twenty-nine dollars ($8,915,629) were cash, and the remainder, eighty-two million four hundred ninety-one thousand eight hundred seventy-one dollars ($82,491,871) were in the stock of this defendant, at par.

The said transfer was fully completed on said day, through the delivery by the said Harriman and Pierce, to this defendant, of the proper certificates of the Northern Pacific Railway Company for all said preferred and common stock of that company, together with properly executed instruments for the transfer thereof to this defendant upon the books of the Northern Pacific Railway Company, and through payment by this defendant, to said Harriman and Pierce, of the sum of eight million nine hundred fifteen thousand six hundred twenty-

nine dollars ($8,915,629), in cash, and the delivery to them, by this defendant, of its proper certificates for eighty-two million four hundred ninety-one thousand eight hundred seventy-one dollars ($82,491,871) of its capital stock.

The said acquisition by this defendant of the said preferred and common stocks of the Northern Pacific Railway Company was absolute and unconditioned, and was intended so to be both by the said Harriman and Pierce and this defendant.

This defendant admits that, since its acquisition from said Harriman and Pierce, of said Northern Pacific stock, it has been informed, and it believes, that the stock of this defendant, issued to them, as aforesaid, in part payment therefor, is in fact the property of the plaintiff, the Oregon Short Line Railroad Company, for which said plaintiffs hold the same in their personal names, as trustees.

There has never been any understanding or agreement, express or implied, between this defendant and the Oregon Short Line Railroad Company, or between this defendant and the said Harriman and Pierce, as to how long the said preferred or common stock should be held or retained by this defendant, or as to how it should be managed or voted while this defendant should continue to hold it.

VIII.

This defendant admits that all the said eighty-two million four hundred ninety-one thousand dollars ($82,491,000), par value, of capital stock of this defendant, sold and issued to the plaintiffs, Harriman and Pierce, have been, by the said plaintiffs, mortgaged and pledged to the plaintiff, the Equitable Trust Company, to secure an issue of bonds of the said Oregon Short Line Railroad Company to an equal amount; all of which bonds are now outstanding, and are held and owned by sundry persons and corporations; but this defendant denies that any part of the said mortgaged or pledged shares of this defendant's stock is available for tender, return or restoration to this defendant under the conditions offered by the bill of complaint.

IX.

This defendant denies that it has ever agreed or undertaken with any of the plaintiffs, or with any other person or corporation, that the said preferred stock of the Northern Pacific Railway Company acquired by this defendant from the said Harriman and Pierce, should be converted into common stock of the said Railway Company, or as to whether this defendant should retain said stock or dispose of it, or as to what disposition this defendant should make of the same.

This defendant denies that any part of the said preferred stock ever has been converted, or has ever been capable of conversion, into common stock of the said Railway Company, or into anything else except cash, at par. This defendant admits and avers that the said Railway Company has issued to this defendant shares of its new common stock to the amount of thirty-four million seven hundred nine thousand and sixty-two dollars ($34,709,062), par value, which shares stand on the books of the said Railway Company in the name of this defendant as owner thereof; but this defendant denies that any part of the said new common stock has ever been substituted by this defendant, or by the said Railway Company, for any part of the said preferred stock purchased from the plaintiffs.

And this defendant avers that all the said thirty-four million seven hundred nine thousand and sixty-two dollars ($34,709,062) new common stock of the said Railway Company was issued to this defendant in exchange for a like amount of bonds of the said Railway Company, convertible into its stock, which this defendant had previously purchased from the said Railway Company, for cash, at par, and which at the time of such exchange were exclusively the property of this defendant.

X.

This defendant admits that on or about March 10th, A. D. 1902, the United States began a suit in the Circuit Court of the United States, for the District of Minnesota, against this defendant and others, in which suit pleadings were filed by the several parties, and other proceedings were had, substantially as set forth in paragraphs X, XI and XII of the bill of complaint herein; but this defendant denies that either or any of the plaintiffs in this suit was represented in the said litigation with the Government of the United States by any of the defendants therein, save in regard to such rights and interests as were, or might have been, held by the said plaintiffs as stockholders of this defendant, in common with all other stockholders of this defendant, and in proportion to their respective holdings of this defendant's stock, but not in regard to anything which might be the subject of a claim by the plaintiffs herein, or by any of them, adversely to this defendant, or to its other stockholders.

XI.

This defendant denies that the effect of the decree in said suit rendered by the Circuit Court, and affirmed by the Supreme Court of the United States, was to determine or establish that this defendant has acquired, and now holds, the stocks of the

said Railway Companies as a mere custodian or trustee, and not as absolute owner; and denies that ownership of said railway stocks by this defendant was, or is, in any way called in question by said decree.

XII.

This defendant admits and avers that after affirmance by the said Supreme Court of the said decree of the said Circuit Court, and on March 22nd, A. D. 1904, the Board of Directors of this defendant, at a meeting thereof duly held, duly and lawfully determined that in its opinion the certificate of incorporation of this defendant should be amended so as to reduce this defendant's capital stock to the sum of three million nine hundred fifty-four thousand dollars ($3,954,000), and that the stocks of the said Railway Companies owned by this defendant which, upon such reduction would become surplus assets of this defendant, should be distributed ratably among all defendant's stockholders, and that the proposition for such reduction of capital stock, and consequent distribution of surplus assets, should be submitted to defendant's stockholders, at a meeting thereof to be called for the special purpose; and to that end the said Board at said meeting duly adopted the preambles and resolutions set forth in paragraph XIV of the bill of complaint herein.

Afterward, and on April 21st, A. D. 1904, upon due notice of the time and place of meeting, given as required by the laws of the State of New Jersey, the said meeting of stockholders duly convened, and by the affirmative votes of the holders of more than two-thirds, and of nearly three-fourths, of all this defendant's outstanding capital stock, resolutions were duly adopted in favor of the proposed reduction of stock and distribution of assets.

All the said proceedings of this defendant's Board of Directors and stockholders were regular and legal, and in accordance with the laws of the State of New Jersey, in every particular, and none of the said proceedings has in any way violated any right of any of the plaintiffs.

XIII.

As to whether shares of stock of the Northern Pacific Railway Company, to the amount claimed by the plaintiffs in their bill of complaint, could be purchased in the market, or from individuals, this defendant has no knowledge or information sufficient to form a belief; but suggests that in event of distribution of all defendant's holdings of said stock ratably among all its stockholders, the ownership of the entire capital stock of the Northern Pacific Railway Company, aggregating one hundred

fifty-five million dollars ($155,000,000), will be scattered among nearly three thousand (3,000) separate holders, all of them presumably subject to the ordinary motives that actuate the owners of property ; but defendant denies that the said proposed distribution of said railway stock will inflict any injury whatever upon the plaintiffs or upon any of them.

XIV.

These defendants admit that the ratable proportions of said railway stocks which will accrue to the plaintiffs on the distribution proposed by this defendant will be thirty-two million seventy thousand six hundred twelve dollars ($32,070,612), par value, of Northern Pacific stock, and twenty-four million six hundred thirty-eight thousand nine hundred nineteen dollars ($24,638,919), par value, of Great Northern stock ; the current rate of dividend on each of said railway stocks now being seven per cent. per year ; and that consequently the aggregate income from said distributive proportions would not now equal seven per cent. per year on the sum of seventy-eight million one hundred and eight thousand dollars ($78,108,000) ; but this defendant avers that the annual income, at seven per cent. per annum, on the said distributive proportions exceeds, by a very large sum of money, the dividends at the current annual rate, viz : four and one-half per cent. per annum, upon the eighty-two million four hundred ninety-one thousand eight hundred seventy-one dollars ($82,491,871), par value, of the stock of this defendant taken by said Harriman and Pierce in part payment for the said seventy-eight million one hundred and eight thousand dollars ($78,108,000), par value, of preferred and common stock of the Northern Pacific Railway Company, so that the effect of acceptance by plaintiffs of their ratable proportion of the two railway stocks will be to largely increase their income from their investment in the stock of this defendant.

XV.

This defendant denies that plaintiffs are able to return or to restore to this defendant the whole or any part of the certificates for this defendant's stock, delivered as aforesaid, in part payment for said railway stock purchased by it, otherwise than upon, and in consideration of the acceptance by the plaintiffs of the ratable proportion of the stocks of the Northern Pacific Railway Company and the Great Northern Railway Company which will accrue to the plaintiffs under the plan of distribution proposed and adopted by this defendant ; all of which will more fully appear by examination of the said deed of trust, to which reference is hereby made.

XVI.

This defendant admits that since it began to do business it has kept books of account, and registers of the transfers and ownership of its stock; and avers that the methods used by it for the keeping of all its accounts and stock records have been the most modern, and the most approved by those having the best experience in that class of business; and that such accounts and records have always been accurately kept by competent and skillful men in this defendant's employment, and contain accurate statements of all the transactions therein recorded.

This defendant admits and avers that the said accounts and records accurately show the consideration for each and every original issue of stock by this defendant, and also what stock certificates of this defendant have been surrendered to it for cancellation, upon transfer, on this defendant's books, of the stock covered by such certificates.

This defendant avers that all the stock certificates which have been issued by it since commencement of its business have been of the same form and tenor, save as to the number of shares covered thereby; that none of said certificates has in any way indicated the consideration for which the stock covered thereby was originally issued, or whether such consideration was cash, or the sale to this defendant of the stocks of one or both the said Railway Companies; that in a number of instances a single person or copartnership has sold to this defendant large amounts of the stock of both said Railway Companies as a single and lump transaction, and has received payment therefor from this defendant in shares of its own stock; that in every such instance this defendant has issued to the seller or sellers certificates for its own stock in payment, which, in respect to the number of shares covered, had no reference or application to any specific amount or kind of railway stocks received; that since this defendant began to do business, in November, A. D. 1901, its stock has been freely traded in upon the public markets of the United States and foreign countries, and privately between individuals, and among bankers and brokers; and many thousand sales of such shares have been made; that since this defendant began to do business it has issued altogether about eighty-five thousand (85,000) separate stock certificates; that about sixteen thousand (16,000) separate transfers of its stock have been registered upon its books; but it has reason to believe, and does believe, and therefore avers, that the unrecorded transfers of such stock, effected by mere delivery of the stock certificates, accompanied by blank powers of attorney for transfer, but without registration on this de-

fendant's books, have far exceeded in number and amount those made upon its books; that large amounts of this defendant's stock, issued originally for purchases of both kinds of railway stocks, in one transaction, as aforesaid, have been sold and transferred by their original owners, and been dispersed among a large number of other holders; that in a large number of instances, probably the majority, transfers of this defendant's stock upon its books have been accomplished by the surrender to it of two or more of its stock certificates, covering different numbers of shares, of different and undisclosed origins, and the issuance by this defendant of two or more new certificates, covering numbers of shares not corresponding to the numbers covered by the surrendered certificates, but aggregating the same total; that by reason of the facts aforesaid, it is not now possible to determine the original considerations received by this defendant for shares of its stock covered by a very large proportion of its present outstanding stock certificates.

XVII.

By way of further defense this defendant avers that each and every one of the owners of this defendant's stock now outstanding, has acquired the same, for a valuable consideration, in the belief, and with the right to believe, that such stock represents a ratable proportion of all this defendant's assets, and not a mere chose in action to recover from this defendant specific property or money; that ever since the 14th day of November, A. D. 1901, the plaintiff, E. H. Harriman, has been a director of this defendant, and in that capacity has usually attended the numerous meetings of this defendant's Board of Directors, and has participated in all the business transactions at such meetings; that the plaintiffs, E. H. Harriman and Winslow S. Pierce, and the Oregon Short Line Railroad Company, at all times since this defendant began business, and the plaintiff, the Equitable Trust Company of New York, ever since its acceptance of the trusts under the said pledge or mortgage to it of the said eighty-two million four hundred ninety-one thousand eight hundred seventy-one dollars ($82,491,871) of this defendant's stock, have each and all fully known all the facts aforesaid concerning the issuance and sale by this defendant of its stock, including the sale of seven million five hundred twenty-two thousand dollars ($7,522,000) thereof for cash in the public market, and concerning the sales and transfers of said stock, after issuance, by and between persons, partnerships and corporations, and that neither of the said plaintiffs has at any time ever objected to any of said transactions; but on the contrary each and all of them have always fully acquiesced therein.

And this defendant avers that in consequence of such acquiescence the plaintiffs cannot, nor can any of them, now equitably claim that the said transactions shall not be accorded the legal effect which, on their face, they appeared to have, and which all the participants therein supposed them to have, of vesting in the purchasers and holders of this defendant's stock, a ratable proportion of all this defendant's assets, including the said railway stocks.

And this defendant avers that the plaintiffs, by their course of conduct since this defendant began to do business, have conclusively agreed and undertaken, with each and every other holder and owner of this defendant's stock, that any distribution by this defendant, among its stockholders, of the said railway stocks, shall be ratable to each stockholder, in proportion to his holdings of this defendant's stock.

XVIII.

And by way of further defense, this defendant avers that the plaintiffs, Harriman and Pierce, since this defendant began to do business, and the plaintiff, the Oregon Short Line Railroad Company, since its acceptance of the said mortgage or pledge of the said stock of this company, have at all times been fully acquainted with and informed about all the plans, purposes and business transactions of this defendant, including the purposes with which this defendant has made all of its purchases of stocks of the said Railway Companies; and each and all of said plaintiffs have fully approved and concurred in all of this defendant's said plans and purposes, and in all of its said purchases of railway stocks made in pursuance thereof.

And this defendant denies all and all manner of unlawful combination or conspiracy, wherewith, by the said bill of complaint it is charged, without this, that any other matter, cause, or thing in the said bill of complaint contained, necessary or material for this defendant to make answer to, and not herein and hereby well and sufficiently answered, confessed, traversed, avoided, or denied, is true, and prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

NORTHERN SECURITIES COMPANY,
(L. S.) By JAS. J. HILL, *President.*
JOHN W. GRIGGS,
Solicitor and of Counsel for Defendant,
Northern Securities Company,
JOHN G. JOHNSON,
ELIHU ROOT,
FRANCIS LYNDE STETSON,
Of Counsel for Defendant, Northern Securities Company.
(*Filed Sept. 3, 1904.*)

Circuit Court of the United States,

District of New Jersey.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and EQUITABLE TRUST COMPANY of New York, Complainants,
vs.
NORTHERN SECURITIES COMPANY *et al.*, Defendants.
} On Bill, &c. Replication to Answer.

These replicants, Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company and the Equitable Trust Company of New York, saving and reserving to themselves all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant Northern Securities Company for replication thereunto, say that they do and will aver, maintain and prove their said bill to be true, certain and sufficient in the law, to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by these replicants; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these replicants are ready to aver, maintain and prove as this Honorable Court shall direct, and humbly pray as in and by their said bill they have already prayed.

LINDABURY, DEPUE & FAULKS,
Solicitors for Complainants.

(*Filed Sept. 24, 1904.*)

UNITED STATES OF AMERICA, *District of New Jersey,* } *ss.:*

I, Henry D. Oliphant, Clerk of the Circuit Court of the United States of America, for the District of New Jersey, in the Third Circuit, do hereby certify the foregoing to be a true copy of the original answer and replication to answer, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court at Trenton, in said District, this Fourteenth day of February, nineteen hundred and five.

[SEAL.]

H. D. OLIPHANT,
Clerk Circuit Court, U. S.